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IN THE

Supreme Court of the United States

October Term, 1966.
No. 949

ESTATE OF MAX STEINBERG, Deceased, PEARL STEINBERG, Executrix and PEARL STEINBERG, Individually,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petitioners hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Opinions Below.

The memorandum findings of fact and opinion of the Tax Court are not officially reported. Unofficially, they are reported at 24 TCM 1250. The opinion of the Court of Appeals [App. pp. 1-4] is reported at 367 F. 2d 130.

Jurisdiction.

The judgment of the Court of Appeals was rendered October 10, 1966. [App. p. 1]. The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

Questions Presented.

This is a federal income tax case. The taxpayers were husband and wife. For the two years involved, 1950 and 1951, they filed joint returns. As stated by the Court of Appeals, the assessment for each of those years was barred unless the return was fraudulent, and the burden of showing fraud was on the Commissioner. There are essentially two questions, as follows:

1. Whether an allegation by the Commissioner, in his answer, of undisclosed income of the husband alone, followed by a denial by him, in his brief after the trial; of undisclosed income of the wife, can sustain a determination by the Tax Court that there was undisclosed income of the wife, with the failure to disclose it due to fraud.
2. Whether the Commissioner can sustain his burden of proving fraudulent omission of income by showing net worth increases, without credit for an opening cash hoard alleged by the taxpayers, where the taxpayers fail to prove, to the trial court's satisfaction, the existence or source of the cash hoard, but it is established for the taxable years involved that there was no possible taxable source for the net worth increases alleged.

Mindful of the limitations of certiorari, we pass the further question whether the Tax Court properly struck Pearl Steinberg's testimony, also the question whether the Tax Court's alternative derogation of her testimony was independent of its order striking it, and also the question whether the Tax Court misinterpreted the testimony of the Commissioner's witnesses in respect of leads given them. For the purpose of this petition we limit ourselves to the two questions above because of their great importance in the administration of the revenue.

Tax Court Rule Involved.

Rule 14. Answer.

(b) Form of answer.—The answer shall be drawn so that it will advise the petitioner and the Court fully of the nature of the defense. It shall contain a specific admission or denial of each material allegation of fact contained in the petition and a statement of any facts upon which the Commissioner relies for defense or for affirmative relief or to sustain any issue raised in the petition in respect of which issue the burden of proof is, by statute, placed upon him. . . .

Statement.

The petitions in the Tax Court were filed by Max and Pearl Steinberg, husband and wife. Max died shortly after the trial. Thereafter Pearl alone prosecuted the case in her own right and as executrix of Max's estate. [App. p. 2].

Max and Pearl were married in 1942. The Commissioner determined deficiencies against Max for the years 1947, 1948, and 1949, for which Max and Pearl filed separate returns, and against both for 1950 and 1951, for which they filed joint returns. The assessment for each year was barred unless the return for that year was fraudulent. The burden of showing fraud was on the Commissioner. [App. p. 2].

The Commissioner for that purpose used the "increase in net worth" method. [App. p. 2]. In his answer filed in the Tax Court for 1950 and 1951 he stated that the income alleged by him for each of those two years was derived from "petitioner Max Steinberg's business, investments, and/or other sources." [App.

p. 4]. As to Pearl he stated in his brief in the Tax Court after trial and covering all five years: "there is not even a hint of a source of taxable income to Pearl Steinberg during the taxable years involved, other than the income reported by her." [App. p. 5]. The Tax Court completely absolved Max, thus determining no deficiencies for the first three years, for which only Max's separate returns were challenged by the Commissioner. [App. p. 2]. Thus also the Tax Court by implication rested its determination for the last two years, for which it did determine deficiencies, on the assumption, contrary to the above-quoted allegation in the Commissioner's answer, and contrary to the above-quoted statement in the Commissioner's brief, that there was undisclosed income of Pearl.

Prior to the Tax Court's findings and opinion the record is wholly wanting in any assertion, or any implication, by allegation of the Commissioner or in any other way, that there was undisclosed income of Pearl. For that reason the petitioners complained in the Court of Appeals that the Commissioner's answer in the Tax Court did not advise them fully of the nature of his defense as required by Rule 14(b) of that court, more specifically that they did not know that the Commissioner was asserting undisclosed income of Pearl. [App. pp. 3-4]. Nevertheless, the Court of Appeals in its opinion states:

> "The Commissioner's answer before the Tax Court leaves no doubt that he did not know where the unreported income came from, and that he had no intention of limiting his basis for deficiencies to unreported income generated by Max alone."

The Commissioner may contend that this was warranted by the words "and/or other sources" in the Commissioner's answer, as quoted above. We shall not offend this Court by quoting from texts of high-school English to show that those words, because of the parallel structure of the sentence, necessarily refer back to, and are limited by, the words "petitioner Max Steinberg's" which mediately precede them. Also, if the Commissioner had no intention of basing the deficiencies on unreported income generated by Max alone, there was no reason for the words, "petitioner Max Steinberg's," there at all. Nor would he have limited himself to Max's returns for 1947, 1948 and 1949, the years for which separate returns were filed.

The above-quoted statement of the Court of Appeals just makes no sense. This is all the more so because that court could simply have quoted the Commissioner's answer, thus extravagantly interpreted by it, in less than half the words.

It is obvious that the Court of Appeals did so interpret it in order to cover the clear and direct conflict with the Ninth Circuit set forth below under "Reasons for Granting the Writ." It was also clear error, we believe, to sustain a determination of undisclosed income on the basis of income of the wife where the Commissioner has conceded that there was "not even a hint of a source of taxable income" to her.

Reasons for Granting the Writ.

1. The principal reason for granting the writ consists of a direct conflict with the Court of Appeals for the Ninth Circuit on the necessity of the Commissioner's complying with the Tax Court rule requiring that he fully advise the taxpayer of his defense. In *Commissioner v. Estate of Long,* 304 F. 2d 136, at p. 143, the Court of Appeals for the Ninth Circuit directly held that the requirements of that rule, Tax Court Rule 14(b), must be met by the Commissioner.

True, the Court of Appeals here does not challenge that rule but on the contrary attempts to interpret the Commissioner's answer as showing that "he had no intention of limiting his basis for deficiencies to unreported income generated by Max alone." This distortion of the Commissioner's answer, wherein the Commissioner charged that the income alleged by him was derived from "*Max Steinberg's* business, investments, and/or other sources" (italics supplied), is so gross that it can only be evaluated as an attempt to cover the clear conflict with the *Long* case. The conflict is not only there but in a form so contemptuous of the English language, common sense, and elemental justice that it should not go unchallenged by this court.

2. As a second reason for granting the writ we submit that the distortion of language by the Court of Appeals shown above is of such a character that it calls for exercise of the supervisory function of this Court. Rule

19-1(b) of this Court. We suggest that it goes so far as even to strike at due process.

3. As a third reason for granting the writ we submit that the decision below presents a deviation from *United States v. Massei*, 355 U.S. 595. That case held that in a net-worth fraud case the Commissioner could carry his burden of proof without showing a likely source. But it did not hold that where, as here, in the case of a joint return, the Tax Court wholly absolved the husband, and the Commissioner failed to allege income of the wife but on the contrary conceded that there was "not even a hint of a source of taxable income" to her, that even then the Commissioner had carried his burden of proof.

Wherefore, petitioners pray that this Court issue the writ of certiorari sought herein to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Attorney for Petitioners.